COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-2391

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SHAWN MCFADDEN and BARBARA MCFADDEN,

Plaintiffs-Respondents-Cross-Appellants,

v.

FERRELLGAS COMPANY, INC., a domestic corporation,

Defendant-Respondent,

EID ENTERPRISES, INC., d/b/a NORTHERN MOBILE HOMES, a domestic corporation,

Defendant-Appellant-Cross-Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Eid Enterprises, Inc., appeals a summary judgment concluding that Eid, the seller of a mobile home, bore the risk of loss when the home was damaged by fire before the buyers, Shawn and Barbara McFadden, took possession. Eid argues that the purchase agreement passed the risk of loss to the McFaddens under § 402.509(4), STATS., and that the trial court should have reduced the damages by the amount the McFaddens received in an earlier settlement of an action against an insurance agency. The McFaddens cross-appeal, arguing that the court should have awarded them the full cost of financing as consequential damages. Finally, both Eid and the McFaddens argue that the trial court improperly granted summary judgment dismissing their claims against Ferrellgas Company, Inc., in which they alleged that Ferrellgas employees caused the fire. We affirm the trial court's conclusions that Eid bore the risk of loss, that the settlement does not affect the damages and that the McFaddens are not entitled to consequential damages. We conclude, however, that reasonable inferences from the depositions and expert testimony create factual disputes that make it inappropriate to grant summary judgment dismissing the action against Ferrellgas.

The McFaddens purchased a mobile home from Eid pursuant to a purchase agreement that required completion of delivery and setup. After the mobile home was moved onto the McFaddens' residential lot and the electricity was connected, Eid's employees connected the water and sewer while Ferrellgas employees installed the propane gas and connected the gas appliances. After Eid's employees had completed their work and left the premises, Ferrellgas employees remained for an additional forty-five minutes to one hour to complete the gas hookups and light the pilot lights. While in the mobile home or while leaving the premises, depending on whose testimony is believed, the Ferrellgas employees heard a smoke alarm sound inside the mobile home. The Ferrellgas employees either vented the smoke and then left the premises or disregarded the alarm and departed. Shortly after they left, the home was substantially damaged by fire.

The risk of loss did not pass from Eid to the McFaddens because Eid had not yet completed delivery of the mobile home at the time of the fire. Under §§ 402.509(3) and (4), STATS., the risk of loss remained with Eid until the McFaddens took receipt of the mobile home unless the purchase agreement

provided otherwise. The purchase agreement provided that the risk of loss shifted from Eid to the McFaddens "upon completion of delivery and setup." Even if we assume that setup had been completed, Eid had not yet completed delivery of the mobile home as a matter of law.

Courts have uniformally construed "delivery" to entail more than merely transporting goods to the buyer. Rather, delivery occurs when a seller does "everything necessary to put goods completely and unconditionally at the buyer's disposal." ***Goosic Constr. Co. v. City Nat'l Bank***, 241 N.W.2d 521, 522 (1976); *accord* ***Ward v. Merchants & Farmers Bank***, 394 S.2d 1374, 1375 (Miss. 1981); ***Fox v. Young***, 91 S.W.2d 857 (Tex. Civ. App. 1936). Eid's actions do not support its argument that delivery was completed. The uncontradicted evidence established that Eid had not prepared the title application or completed the delivery check list and that forms required to be signed by the McFaddens had not yet been completed or delivered. More significantly, Eid barred the McFaddens access to the mobile home for two weeks after the fire and retained a set of keys to the home. These undisputed facts demonstrate that the home was not completely and unconditionally at the McFaddens' disposal. Therefore, delivery of the mobile home was not completed as a matter of law and the risk of loss remained with Eid under the terms of the sale agreement.

The trial court properly rejected Eid's contention that the damages should be reduced by the amount the McFaddens received in an earlier settlement of their claims against their insurance agency. These claims apparently related to the agency's failure to procure requested insurance and a bad faith claim. It is not clear whether this settlement included any compensation for loss of the mobile home rather than household goods and bad faith damages. Even if a portion of the settlement related to the loss of the home, the amount of damages in a contract action are not affected by the owners' collateral recovery from their insurer. *See* ***W.G. Slugg Seed & Fertilizer, Inc. v. Poulsen***, 62 Wis.2d 220, 227-28, 214 N.W.2d 413, 417 (1974).

In their cross-appeal, the McFaddens seek consequential damages for the full cost of financing the purchase price of the home. Under § 402.613, STATS., if identified goods are destroyed without fault of either party before the risk of loss passes to the buyer, performance of the contract becomes impossible and the contract is avoided. Avoidance relieves the seller of the responsibility to pay consequential damages. The McFaddens argue that the mobile home did

not constitute "identified goods" because there was nothing unique or irreplaceable about it. We disagree. Eid manufactured the home to the McFaddens' specifications as to size, configuration and options. The McFaddens picked out the colors and specifications of the carpet, linoleum, wall coverings, vinyl siding, and roof. Therefore, the mobile home was an "identified good" and, under § 402.613, no consequential damages may be awarded.

Finally, genuine issues of material fact and conflicting inferences that may be drawn from the depositions and expert testimony preclude summary judgment dismissing Ferrellgas. An expert witness was able to rule out specific causes of the fire, including the LP gas system and appliances and the structure's electrical components. He determined that the fire most likely originated in some boxes located against the wall in the bedroom where the Ferrellgas employees had been working. He could not definitely establish negligence by Ferrellgas or its employees. However, where expert testimony has eliminated the more complex causes of the fire, expert testimony is not necessary to make a reasonable inference as to how the fire started because that determination involves matters of common knowledge. *See* ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis.2d 147, 150, 172 N.W.2d 427, 429 (1969). Fires are started from a limited number of causes, three of which the expert has ruled out. Ferrellgas employees used matches to light the appliances; they were the last people in the mobile home; they heard the fire alarm go off at some time when they were on the property; and within ten to forty-five minutes of their departure the mobile home burned down. Conflicting reasonable inferences can be drawn from these facts, including an inference that the Ferrellgas employees improperly disposed of the matches used to light the pilot lights or carelessly discarded smoking materials.

Although the mere occurrence of fire does not permit an inference of negligence, ***Alredge v. Scherer Freight Lines, Inc.***, 269 Wis. 142, 148, 68 N.W.2d 821, 825 (1955), there is credible evidence from which a jury could determine that the negligence of Ferrellgas employees caused the fire. Therefore, the question is a proper one for the jury. ***Bruss v. Milwaukee Sporting Goods Co.***, 34 Wis.2d 688, 696, 150 N.W.2d 337, 340 (1967).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs to either party.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.